Pendaftar Besar Kelahiran dan Kematian, Malaysia v Pang Wee See & Anor (applying on their behalf and as litigation representatives for Pang Cheng Chuen, a child)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(A)-74–03 OF 2016
ABANG ISKANDAR, ZAMANI A RAHIM AND ZALEHA YUSOF JJCA
6 APRIL 2017

Constitutional Law — Citizenship — Application for — Whether Malaysian adoptive parents of child born in Malaysia could rely upon adoption order of court and provisions of Adoption Act 1952 to claim Malaysian citizenship for child — Whether matters governing citizenship solely housed within Federal Constitution and no other legislation — Whether Adoption Act 1952 silent on citizenship status of adopted child could not be used to widen scope of word 'parents' in s 1(a) of Part II of Second Schedule of the Federal Constitution to include adoptive parents — Whether 'parents' in that provision referred only to biological parents of person seeking citizenship

The respondents obtained an adoption order from the High Court to adopt a child born in a hospital in Kuala Lumpur. They then applied to the National Registration Department ('NRD') for a birth certificate for the child. The birth certificate that was subsequently issued stated that the child was not a citizen of Malaysia. This was because the NRD had no information regarding the child's biological parents. By way of judicial review, the respondents applied to the High Court to quash the NRD's decision on the child's citizenship status and to compel it to register the child as a Malaysian citizen. The respondents were of the view that as the child was born in Malaysia and they, as his adoptive parents, were Malaysian citizens, the child was a Malaysian citizen by operation of law under the relevant provisions of the Federal Constitution read together with the Adoption Act 1952 ('the Adoption Act'). The High Court held that pursuant to ss 9 and 25A of the Adoption Act, the adoption certificate issued in respect of the child gave him the status of a citizen of Malaysia. In the instant appeal, the appellant argued that the High Court's decision was wrong as: (i) the respondents failed to fulfill the requirements under art 14(1)(b) read with s 1(a) of Part II of Second Schedule of the Federal Constitution; (ii) the absence of information about the child's biological parents had not been considered; and (iii) the Adoption Act was not relevant in determining the child's citizenship.

Held, allowing the appeal and setting aside the decision of the High Court:

(1) An adoption order issued under the Adoption Act 1952 did not confer Malaysian citizenship on an adopted child even though one of his adoptive parents was a Malaysian citizen or a person permanently resident in Malaysia by operation of law within the contemplation and ambit of art 14(1)(b) read with s 1(a), Part II, Second Schedule, of the Federal Constitution. To be a Malaysian citizen by operation of law under art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution, the person must be born in Malaysia and one of his biological parents must, at the time of the person's birth, be either a Malaysian citizen or a person who was permanently resident in Malaysia. In the instant appeal, the respondents did not fulfill that crucial biological, or the *jus sanguinis*, criterion as envisaged under the said article (see para 40).

(2) The Adoption Act 1952 was not competent as a legal instrument to confer citizenship status to an adopted child under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution. The fact that the Adoption Act was silent on the subject of the citizenship status of an adopted child was telling. The Adoption Act 1952, being a subsidiary legislation *qua* the Federal Constitution, could not be interpreted in such a way as to augment what appeared to be a perceived lacuna in the Federal Constitution (see paras 34–36 & 39).

(3) One of the key ingredients in art 14(1)(b) read together with s 1(a) of Part II of Second Schedule of the Federal Constitution was that the person seeking to be a citizen via this specific constitutional provision had to show proof that when he was born in this country, one of his parents was either a citizen of Malaysia or was permanently resident in this country. The phrase used in that provision was 'is at the time of the birth'. That phrase categorically made reference to the biological parent of the person and he had to be either a Malaysian citizen or a person who was permanently resident in Malaysia. That provision did not contain any reference to an adoptive parent, albeit a Malaysian adoptive parent (see para 31).

(4) If the word 'parent' in art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution was intended to include an adoptive parent in the Adoption Act 1952, as opposed to a biological parent, such intention would have been expressly provided for in the provisions on interpretations in the Federal Constitution itself. Any submission to the effect that the Adoption Act 1952 provided a perceived missing link in the meaning of parents in art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution, was seriously flawed (see para 22).

(5) The law on citizenship was contained, both procedurally and substantively, in the Federal Constitution itself. There was no statute that

was specially legislated to house the specific provision pertaining to citizenship. Rather, those provisions resided in the Federal Constitution and they made no reference to other specific statutes, especially in aid of its interpretation. In fact, the Federal Constitution itself provided for the interpretation required in order to make clear what the words in the citizenship provisions were supposed to mean. In other words, the citizenship provisions in the Federal Constitution were exclusively housed in the Federal Constitution itself (see para 21).

(6) The respondent had not exhausted his avenue for redress and he could still apply for citizenship by way of registration under art 15A of the Federal Constitution (see paras 41–42).

[Bahasa Malaysia summary

Responden-responden telah memperoleh perintah anak angkat dari Mahkamah Tinggi untuk mengambil anak angkat yang dilahirkan di hospital di Kuala Lumpur. Mereka kemudian memohon kepada Jabatan Pendaftaran Negara ('JPN') untuk sijil kelahiran bagi anak itu. Sijil kelahiran yang berikutnya dikeluarkan menyatakan bahawa anak itu bukan warganegara Malaysia. Ini adalah kerana JPN tiada maklumat berkaitan ibubapa kandung itu. Melalui semakan kehakiman, responden-responden telah memohon kepada Mahkamah Tinggi untuk membatalkan keputusan JPN berhubung status warganegara anak itu dan untuk mendesaknya mendaftar anak itu sebagai warganegara Malaysia. Responden-responden berpendapat bahawa oleh kerana anak itu lahir di Malaysia dan mereka, sebagai ibubapa angkatnya, adalah warganegara Malaysia, anak itu adalah warganegara Malaysia melalui kuat kuasa undang-undang di bawah peruntukan relevan Perlembagaan Persekutuan dibaca bersama Akta Pengangkatan 1952 ('Akta Pengangkatan tersebut'). Mahkamah Tinggi memutuskan bahawa menurut ss 9 dan 25A Akta Pengangkatan tersebut, sijil pengangkatan yang dikeluarkan berkaitan anak itu memberikannya status warganegara Malaysia. Dalam rayuan ini, perayu berhujah bahawa keputusan Mahkamah Tinggi adalah salah kerana: (i) responden-responden telah gagal memenuhi keperluan di bawah perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II Jadual Kedua Perlembagaan Persekutuan; (ii) ketiadaan maklumat tentang ibubapa kandung anak itu tidak dipertimbangkan; dan (iii) Akta Pengangkatan tersebut tidak relevan dalam menentukan warganegara anak itu.

Diputuskan, membenarkan rayuan dan mengetepikan keputusan Mahkamah Tinggi:

(1) Perintah pengangkatan yang dikeluarkan di bawah Akta Pengankatan 1952 tidak memberikan warganegara Malaysia kepada anak yang diangkat meskipun salah seorang daripada ibubapa kandungnya merupakan warganegara Malaysia atau seorang yang bermastautin secara tetap di Malaysia melalui kuat kuasa undang-undang dalam jangkaan

dan skop perkara 14(1)(b) dibaca bersama s 1(a), Bahagian II, Jadual Kedua Perlembagaan Persekutuan. Untuk menjadi warganegara Malaysia melalui kuat kuasa undang-undang di bawah perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II, Jadual Kedua Perlembagaan Persekutuan, seseorang itu mesti dilahirkan di Malaysia dan salah seorang daripada ibubapa kandungnya, pada masa seseorang itu dilahirkan, adalah sama ada warganegara Malaysia atau seseorang yang bermastautin tetap di Malaysia. Dalam rayuan ini, responden-responden tidak memenuhi kriteria penting tentang ibubapa kandung, atau *jus sanquinis*, sepertimana termaktub di bawah perkara tersebut (lihat perenggan 40).

(2) Akta Pengangkatan 1952 tidak kompeten sebagai alat perundangan untuk memberikan status warganegara kepada anak angkat di bawah perkara 14(1)(b) dibaca degan s 1(a), Bahagian II, Jadual Kedua Perlembagaan Persekutuan. Fakta bahawa Akta Pengangkutan tidak menyatakan berhubung hal perkara status warganegara anak angkat adalah jelas. Akta Pengangkatan 1952, sebagai perundangan subsidiari *qua* Perlembagaan Persekutuan, tidak boleh ditafsirkan dalam cara seperti menambah apa yang kelihatan sebagai *lacuna* dalam Perlembagaan Persekutuan (lihat perenggan 34–36 & 39).

(3) Salah satu daripada inti pati penting dalam perkara 14(1)(b) dibaca bersama s 1(a) Bahagian II Jadual Kedua Perlembagaan Persekutuan adalah bahawa seseorang yang memohon menjadi warganegara melalui peruntukan perlembagaan spesifik ini telah menunjukkan bukti bahawa apabila dia dilahirkan dalam negara ini, salah seorang daripada ibubapanya adalah sama ada warganegara Malaysia atau bermastautin dengan tetap di negara ini. Frasa yang digunakan dalam peruntukan tersebut adalah 'is at the time of the birth'. Frasa tersebut secara kategori membuat rujukan kepada ibubapa kandung seseorang dan dia hendaklah sama ada warganegara Malaysia atau seseorang yang bermastautin dengan tetap di Malaysia. Peruntukan tersebut tidak mengandungi apa-apa rujukan kepada ibubapa angkat, walaupun ibubapa angkat Malaysia (lihat perenggan 31).

(4) Jika perkataan 'parent' dalam perkara 14(1)(b) dibaca dengan s 1(a), Bahagian II, Jadual Kedua Perlembagaan Persekutuan berniat untuk termasuk ibubapa angkat dalam Akta Pengangkatan 1952, berbanding dengan ibubapa kandung, niat sedemikian telah jelas diperuntukkan dalam peruntukan-peruntukan berhubung pentafsiran dalam Perlembagaan Persekutuan itu sendiri. Apa-apa hujah berhubung Akta Pengangkatan 1952 memperuntukkan tanggapan tiada kaitan dalam maksud ibubapa dalam perkara 14(1)(b) dibaca bersama s 1(a), Bahagian II, Jadual Kedua Perlembagaan Persekutuan, telah cacat dengan serius (lihat perenggan 22).

(5) Undang-undang berhubung kewarganegaraan terkandung, kedua-dua

secara prosedural dan substantif, dalam Perlembagaan Persekutuan itu sendiri. Tiada statut yang digubal khusus untuk menempatkan peruntukan spesifik berkaitan kewarganegaraan. Sebaliknya, peruntukan-peruntukan tersebut terkandung dalam Perlembagaan Persekutuan dan tidak membuat rujukan kepada statut spesifik lain, terutamanya bagi membantu pentafsirannya. Bahkan, Perlembagaan Persekutuan sendiri memperuntukkan pentafsiran yang dikehendaki bagi tujuan menjelaskan apa yang dimaksudkan oleh peruntukan-peruntukan kewarganegaraan itu. Dalam erti kata lain, peruntukan-peruntukan kewarganegaraan dalam Perlembagaan Persekutuan terletak secara eksklusif dalam Perlembagaan Persekutuan sendiri (lihat perenggan 21).

(6) Responden tidak menggunakan peluangnya untuk pembelaan dan dia masih boleh memohon untuk warganegara melalui pendaftaran di bawah perkara 15A Perlembagaan Persekutuan (lihat perenggan 41–42).]

Notes

For a case on application for citizenship, see 3(2) *Mallal's Digest* (5th Ed, 2015) para 2397.

Cases referred to

Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia [2016] 7 MLJ 717, HC (folld)

Lee Chin Pon & Anor v Registrar-General of Birth and Deaths, Malaysia [2010] (unreported) (refd)

Leong Peng Kheong & Anor v Registrar-General of Births and Deaths Malaysia Application for Judicial Review No 25–102–05 of 2014 (unreported) (refd)

Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC (refd)

Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body [2014] 3 MLJ 467, CA (refd)

Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor [2011] 2 MLJ 457; [2010] 9 CLJ 505, FC (refd)

Legislation referred to

Adoption Act 1952 ss 3(1), 9, 9(1), (2), 25, 25(5), (6), 25A, 25A(5), (6)

Adoption of Children Act [SG] s 7(9)

Federal Constitution arts 4(1), 14, 14(1)(b), 15A, Second Schedule, Part II, ss 1, 1(a), (e), 2(1), 3

Appeal from: Application for Judicial Review No 25–7–04 of 2015 (High Court, Shah Alam)

Maisarah Juhari (Senior Federal Counsel, Attorney General's Chambers) for the appellant.

Raymond Mah Mun Kitt (Liow Pei Xia and John Chan Chia Yoong with him) (Mah Weng Kwai & Assoc) for the respondent.

Abang Iskandar JCA (delivering judgment of the court):

BRIEF FACTS OF THE CASE

[1] In March 2001, Pang Wee See and Yee Oii Pah ('the applicants') were informed by a relative that there was a newborn baby ('the child') at Taj Hospital, Jalan Ipoh, Kuala Lumpur for adoption. The applicants decided to adopt the child as they did not have any children of their own.

[2] On 23 March 2001, the applicants registered the birth of the child at National Registration Department ('NRD') with the applicants' names as the biological parents of the child ('first birth certificate').

[3] On 29 August 2013, the second applicant (Yee Oii Pah) together with the child went to NRD to apply for a MyKad for the child. The second applicant was interviewed by Encik Mohd Afizul bin Yajid, an officer from the NRD, in respect of the accuracy of the applicants' names on the child's first birth certificate. The second applicant disclosed to Encik Mohd Afizul that the child was not formally adopted. Encik Mohd Afizul explained the necessary steps needed to be taken for the child to be formally adopted, including amending certain particulars of the first birth certificate.

[4] On 23 January 2014, the NRD reissued the child's birth certificate ('second birth certificate') which recorded the following information:

(a) the child's biological parents are recorded as 'information not available'; and

(b) the child is registered as having been born on 8 March 2011 in Taj Hospital Jalan Ipoh, Kuala Lumpur.

[5] The applicants then made an application to the Kuala Lumpur High Court vide an originating summons dated 25 February 2014 to adopt the child which was later duly granted by the High Court on 19 September 2014. In the order, the High Court had confirmed that the child was born in Malaysia on 8 March 2001 at Taj Hospital, Jalan Ipoh, Kuala Lumpur. Based on the court order, the applicants applied to the NRD for a new birth certificate pursuant to

s 25 of the Adoption Act 1952.

[6] On 13 February 2015, the NRD issued a new birth certificate for the child ('current birth certificate'). However the current birth certificate registered the child as not a citizen of Malaysia.

[7] Upon enquiry by the applicants on the issue of citizenship of the child, NRD office informed the applicants that the NRD would not register the child as a citizen of Malaysia based on the adoption order because the NRD had no data on the biological parents of the child. The child was hence rendered stateless.

[8] Subsequently, on 8 April 2015, the applicants filed an application for leave for judicial review ('JR') to quash the decision of the respondent on the citizenship matter of the child. They had also prayed for an order of mandamus to compel that respondent to register the child as a citizen of Malaysia. The leave was granted on 9 July 2015.

[9] The applicants then filed the application for JR which prayed for the following reliefs:

(a) a declaration that Pang Cheng Chuen ('PCC'), a child is a citizen of Malaysia by operation of law by virtue of his birth within the Federation of Malaysia pursuant to art 14(1)(b), Part II, s 1 para (e) and s (3) of the Second Schedule of the Federal Constitution;

(b) a declaration the child is a citizen of Malaysia by operation of law by virtue of his lawful adoption by the applicants pursuant to the order for adoption dated 19 September 2014 made by the Kuala Lumpur High Court in Adoption No 34–3–02 of 2014 read with ss 9 and 25A of the Adoption Act 1952 and art 14(1)(b) and Part II s 1 para (a) of the Second Schedule of the Federal Constitution;

(c) an order of certiorari to quash the decision of the respondent on 13 February 2015 to issue the birth certificate of the child (Series No 000957 XA) dated 27 February 2014 and signed by the respondent which registered the child as a non-citizen and not a citizen of Malaysia;

(d) an order of mandamus directing the respondent to reissue the birth certificate of the child to register the child as a citizen of Malaysia;

(e) costs; and

(f) such further orders and/or directions as may be given or made as this honourable court deemed fit and just in the circumstances.

[10] On 1 March 2016, the learned High Court judge allowed the applicants' application for JR. The learned High Court judge had allowed the JR based on the provisions of ss 9 and 25A of the Adoption Act 1952. It was his considered view that the adoption certificate issued to the child had changed his status with regard to his citizenship status. He had also referred to two unreported cases of *Lee Chin Pon & Anor v Registrar-General of Birth and Deaths, Malaysia* [2010] (unreported) and the case of *Leong Peng Kheong & Anor v Registrar-General of Births and Deaths Malaysia* Application for Judicial Review No 25–102–05 of 2014 (unreported) to premise his decision upon. Essentially both cases had decided that an adoption order had the effect of granting citizenship to an adopted child whose biological parents could not be traced and whose citizenship could not be ascertained as being Malaysian citizen(s). He therefore, had allowed prayers 1, 2, 3 and 4 of the respondent's application for JR. Thus the appeal to this court by the Pendaftar Besar Kelahiran dan Kematian, Malaysia.

THE APPEAL

[11] We heard the appeal on two occasions ie on 23 November 2016 and 3 January 2017. We indicated to parties that we required a bit of time to deliberate on the submissions in light of the cause papers in the record of appeal and that we would inform them of our decision at a date to be fixed. We now deliver our decision and our reasons for having so decided.

[12] Before us, the senior federal counsel ('SFC') for NRD raised two main issues. Firstly:

(a) the learned High Court judge has erred in laws and in facts in making a finding that the applicants have fulfilled the requirement under art 14 of the Federal Constitution and s 1(a) of Part II Second Schedule of the Federal Constitution;

(b) the learned High Court judge was wrong in law and facts in failing to take into account that the biological parents of the said child is untraceable up to this date; and

(c) the learned High Court judge had erred in law and facts when the High Court made a finding that the Adoption Act 1952 is relevant and is taken into consideration in determining the citizenship status of the said child.

[13] The second issue raised by the NRD being the appellant in this appeal is encapsulated like the following:

(a) the learned High Court judge was wrong in law and facts when he failed to take into account the requirement provided under art 14 of the

Federal Constitution and s 2(1) of Part II Second Schedule of Federal Constitution in determining the citizenship status of the child; and

(b) the learned High Court judge had erred in law and facts in failing to take into account that the applicants had failed to fulfil the requirement in order to obtain citizenship by operation of law under art 14 of the Federal Constitution in totality.

[14] *Preliminary objections by the respondent:*

The preliminary objection was premised on the pleading point. He had quoted the decision of this court of *Malaysia Land Properties Sdn Bhd v Waldorf & Windsor Joint Management Body* [2014] 3 MLJ 467 ('*Malaysia Land Properties* case') as follows:

> [33] The appellant did not include the lack of locus as a ground in its memorandum of appeal and neither did it apply to amend the memorandum of appeal to do so. There is a plethora of weighty decisions that an appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum of appeal as a matter of essential justice ...

[15] Having considered the submissions on this preliminary objection, we had sustained it. The learned SFC submitted before us that since the appellant had stated that it was appealing against the whole decision, it must be interpreted that the whole decision of the learned trial judge was at large and was subject to curial scrutiny. Granted it was so stated, we were of the considered view that such intention was somehow caveated by what was actually pleaded in the memorandum of appeal ('MOA').

[16] We took the view as stipulated in the *Malaysia Land Properties* case. On top of that the appellant did not seek to amend the MOA to evince its intention of appealing against the other order of the learned High Court judge, which the learned SFC admitted before us, had been omitted and was conspicuously missing in the MOA that was filed with the court.

[17] Premised on the above, we agreed with the respondents that the appellant was bound by its own pleadings. We therefore allowed the objection by learned counsel for the respondents.

[18] As a consequence thereof, the appellant was allowed to prosecute this appeal based on what were pleaded in the MOA, which essentially could be summarised as follows, namely:

(a) the respondents failed to fulfil the requirements under art 14, Part II, s 1, para (a) of the Second Schedule of the Federal Constitution;

(b) the identity and whereabouts of the biological parents of the child ought to be taken into consideration; and

(c) the Adoption Act 1952 is not relevant in determining the child's citizenship.

[19] That being the case, this appeal was mainly concerned with the issue of the effect of an adoption order issued under the Adoption Act 1952 on the granting of a citizenship on an adopted child, or the child as in this appeal.

[20] Postulated in another way, as was properly framed for our consideration by the respondents namely, whether the Adoption Act 1952 was relevant in determining the citizenship of the child.

[21] We must state here that the law on citizenship is contained, both procedurally and substantively in the Federal Constitution itself. There is no statute that was specially legislated to house the specific provision pertaining to citizenship. Rather, these provisions reside in the Federal Constitution. We noted too, that these provisions make no reference to other specific statutes, especially in aid of its interpretation. In fact, the Federal Constitution itself provides for the interpretation required in order to make clear what the words in the citizenship provisions are supposed to mean. In other words, the citizenship provisions in the Federal Constitution are exclusively housed in the Federal Constitution itself. The Federal Constitution, like most other written Constitutions, is interpreted not in the like manner in which other statutes are normally interpreted. In relation to the Federal Constitution, all other statutes are subsidiary legislations. Thus the constitutionality of the Federal Constitution is considered from the perspective of the Constitution itself. It is not to be interpreted by reference to other statutes, albeit they were passed by Parliament.

[22] In the context of this case, we are of the view, with respect, that if the word 'parent' as appears in art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution was intended to include an adoptive parent in the Adoption Act 1952, as opposed to a biological parent, such intention would have been expressly provided for in the provisions on interpretations in the Federal Constitution itself. Any submission to the effect that the Adoption Act 1952 provides a perceived missing link in the meaning of parents in art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution, to our respectful view, is seriously flawed.

[23] It was submitted by learned counsel for the respondents that cl (5) to s 25A of the Adoption Act 1952 makes reference to the fact that it was good for all purposes and that as such, it must necessarily follow that it was therefore

good for citizenship purposes as well. It was also submitted that there was no express exclusion of the operation of the Adoption Act 1952 pertaining to citizenship matters. The Singapore Adoption of Children Act was cited wherein a reference to the effect that 'an adoption order shall not by itself affect the citizenship of the adopted child' as stipulated under s 7(9) of the said Act. As such, it was submitted that a similar provision must exist in our Adoption Act 1952 in order to say it had no application to citizenship. But neither are we able to see any express provision to the effect that s 25A of the Adoption Act 1952 is meant to affect citizenship matters. So its silence, at its highest, must mean that it is neutral, in light of the unique position of citizenship matters as contained in the Federal Constitution. Any intention to expand its reach must be stipulated expressly in the Federal Constitution itself, not by way of a vague and stretched inference, and residing in other extraneous legislation, such as the Adoption Act 1952.

[24] The learned SFC had submitted before us that the issue on the effect of the Adoption Act 1952 on citizenship by operation of law had been decided by a previous panel of this court in the case of *Chin Kooi Nah (suing on behalf of himself and as litigation representative to Chin Jia Nee, child) v Pendaftar Besar Kelahiran dan Kematian, Malaysia* [2016] 7 MLJ 717 ('the *CKN* case'). The facts obtaining in that *CKN* case were almost similar to our present case and the bone of contention in that case was premised along the same line in that it was submitted by counsel for CKN that the certificate of birth issued under the Adoption Act 1952 (as was issued to the adopted child in our instant case) ought to be taken into account in determining the citizenship of the adopted child Chin Jia Nee ('CJN'). The particulars stating the citizenship of the adoptive parents, as stated in the said certificate, as submitted by counsel, are conclusive as provided for under s 25A of the Adoption Act 1952. In this regard, sub-ss (5) and (6) of s 25A of the said Act were relied upon to anchor such proposition by learned counsel.

[25] We now reproduce the headnote of the *CKN* case from the said report at p 717 which had encapsulated the issues that were before the learned judicial commissioner ('JC'), as follows:

> The question before the High Court in the instant matter was whether an adoption order entitled an adopted child to be registered as a Malaysian citizen as of right and/or by operation of law pursuant to art 14(1)(b) of the Federal Constitution. The applicant herein had obtained an adoption order from the session court to adopt a female child who was born in Malaysia but was abandoned by her biological parents. The child's birth certificate noted that information about her biological parents could not be obtained. The respondent, on being ordered by the court to register the adoption order, issued a new birth certificate for the child that classified her as 'non-citizen' even though the applicant was registered and named as her mother. The respondent rejected the applicant's application to register the child as a Malaysian citizen and advised her to make a formal application for such

citizenship. In filing the instant application to review the respondent's said decision, the applicant relied upon the adoption order and ss 9 and 25A of the Adoption Act 1952 to contend that as she was a Malaysian citizen, the child ought also to be registered as one as the effect of the adoption order was to deem the child as having been born to her in lawful wedlock. The applicant argued that if the respondent did not register the child as a Malaysian citizen the child would be rendered stateless and that fact might adversely affect the child psychologically. The applicant further contended that as the child was born in Malaysia she was a citizen of the country by operation of law under art 14(1)(b) read with Part II of the Second Schedule of the Federal Constitution. The respondent, on the other hand, argued that the applicant failed to produce any evidence about the whereabouts of the child's biological parents as a joint reading of art 14(1)(b), s 1(a) of Part II of the Second Schedule and s 17 Part III of the Second Schedule of the Federal Constitution required it to be shown that those parents were not only legally married but that at least one of them was a citizen of, or permanently resident in, the Federation at the time of the child's birth. The respondent contended that unlike in some jurisdictions where legislation expressly dealt with an adopted child's right to acquire citizenship, adoption in Malaysia did not automatically confer on the child a right to citizenship by operation of law. The respondent also submitted that as the applicant had not exhausted all alternative remedies, such as applying for the child's citizenship by way of registration under art 15A of the Federal Constitution before seeking relief from the court, her application was premature and ought to be dismissed.

[26] The learned JC who heard the matter in the High Court sitting in Penang had dismissed the application for JR by CKN that attempted to quash the decision of the *Pendaftar Besar Kelahiran dan Kematian, Malaysia* ('PBKK') who had stated the citizenship of CJN in the birth certificate as 'a non-citizen', as her biological parent's citizenship could not be determined, although CJN was born in Malaysia. The aggrieved applicant had then appealed to the Court of Appeal where the same argument pertaining to the effect of the adoption order issued under s 3(1) of the Adoption Act 1952 was ventilated before the learned appeal justices in due course. Having considered the arguments, the learned appeal justices dismissed the said appeal and affirmed the decision of the learned JC.

[27] Reverting back to our instant appeal, learned counsel for the respondent, Mr Raymond Mah, had strenuously argued, in defending the learned High Court judge's decision which was in his client's favour, and sought to convince us that what was required under the art 14(1)(b) of the Federal Constitution had been fulfilled by the provisions as contained under s 25A of the Adoption Act 1952, in particular sub-ss (5) and (6) of the s 25A.

[28] Article 14(1)(b) of the Federal Constitution states as follows:

> 1 Subject to the provisions of Part III of this Constitution, the following persons born on or after Merdeka Day are citizens by operation of law, that is to say: (a) every person born within the Federation of whose parents one at least is *at the time of birth*

either a citizen or permanently resident in the Federation: and ... A

[29] In determining citizenship of a person, two concepts are commonly applied, namely the concept of *jus soli* and the concept of *jus sanguinis*. *Jus soli* which means 'right of the soil', and commonly referred to as birth right citizenship, is the right of anyone born in the territory of a state to nationality or citizenship. The determining factor being the *place or territory* where a person was born. In the case of *jus sanguinis*, which in Latin means 'right of blood', is a principle of nationality law by which citizenship is not determined by place of birth but by having one or both parents who are citizens of the state. Viewed from the context of these two concepts, we are of the considered opinion that art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution is a provision which is anchored on the elements of both the concepts of *jus sanguinis* and of *jus soli*, whereby citizenship of a person is traceable to the place of birth namely, Malaysia, as well as Malaysian citizenship of one of the person's parents (the right of blood) *at the time of the person's birth*, in order to be a Malaysian citizen by operation of law, under art 14(1)(b) read with s 1(a), Part II, Second Schedule of the Federal Constitution. B C D

[30] Learned counsel Mr Mah had submitted before us that the combined effect of sub-ss (5) and (6) to s 25 of the Adoption Act 1952 had enabled the applicant to fulfil all the essential legal requirement needed to be fulfilled by a person seeking citizenship by operation of law, as envisaged under the said art 14 of the Federal Constitution. Section 9 of the Adoption Act was also referred to and relied upon in support of the proposition that by virtue of the adoption order issued to the child PCC in particular sub-ss (1) and (2) therein. E F

[31] What had become clear to us had been that one of the key ingredients stipulated in art 14(1)(b) read together with s 1(a) of Part II of the Second Schedule of the Federal Constitution, is that the person seeking to be a citizen of Malaysia via this specific constitutional provision must show proof that *when he was born in this country*, one of his parents must either be a citizen of Malaysia or was permanently resident in this country. The phrase that is employed under that provision reads, '*is at the time of the birth*'. To our minds, that phrase has categorically made a reference to the *biological* parent of the person, who must either be a Malaysian citizen or a person who is permanently resident in Malaysia. By virtue of this phrase, any person intending to claim citizenship by operation of law under the above stated constitutional provision, it is not sufficient that he or she was born in Malaysia. He must be a person, whose either parent was a Malaysian citizen or a Malaysian permanent resident, when he was born in Malaysia. That provision does not contain any reference to an adoptive parent, albeit a Malaysian adoptive parent. G H I

[32] We must now reproduce the provisions in the Adoption Act 1952

which were argued rather forcefully by Mr Raymond Mah, namely s 9(1) and (2) and s 25A(5) and (6) therein.

Section 9 Effect of adoption order

(1) Upon an adoption order being made, all rights, duties, obligations and liabilities of the parent or parents, guardian or guardians of the adopted child, in relation to the future custody, maintenance and education of the adopted child, including all rights to appoint a guardian or to consent or give notice of dissent to marriage shall be extinguished, and all such rights, duties, obligations and liabilities shall vest in and be exercisable by and enforceable against the adopter as though the adopted child was a child born to the adopter in lawful wedlock:

Provided that, in any case where two spouses are the adopters, such spouses shall in respect of the matters aforesaid and for the purpose of the jurisdiction of any Court to make orders as to the custody and maintenance of and right of access to children stand to each other and to the adopted child in the same relation as they would have stood if they had been the lawful father and mother of the adopted child, and the adopted child shall stand to them respectively in the same relation as a child would have stood to a lawful father and mother, respectively.

(2) Where, at any time after the making of an adoption order, the adopter or the adopted child or any other person dies intestate in respect of any movable or immovable property, that property shall devolve in all respects as if the adopted child were the child of the adopter born in lawful wedlock and were not the child of any other person.

Section 25A Certificate of Birth

(1) In respect of the Certificate of Birth referred to in paragraph 25(2)*(b)*, every adoption order shall contain a direction —

(a) to the Registrar General that the word 'adopted', 'adopter' or 'adoptive' or any word to like effect shall not appear in the Certificate; and

(b) to the natural or adoptive parent or parents, as the case may be, to surrender to the Registrar General the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957.

(2) Upon receipt of an adoption order, the Registrar General shall, subject to due compliance with paragraph (1)*(b)* and the payment by the adopter of the prescribed fee, issue a Certificate of Birth in respect of the child in the form set out in the Second Schedule.

(3) Where a certified copy of an entry in the Adopted Children Register had been issued in respect of a child adopted under this Act, the Registrar General shall issue a Certificate of Birth in respect of the child —

(a) upon application being made by the adoptive parent or either of the adoptive parents, or in the event of the adoptive parent or both adoptive parents being dead, by the adopted child, for a Certificate of Birth; and

(b) upon payment of the prescribed fee.

(4) Upon receipt of the Certificate of Birth under subsection (3), the adoptive parent or either of the adoptive parents, or in the event of the adoptive parent or both adoptive parents being dead, the adopted child, shall cause the certified copy of an entry in the Adopted Children Register issued in respect of the adopted child to be surrendered to the Registrar General for cancellation.

(5) The Certificate of Birth issued under this Act pursuant to an adoption order shall replace the Certificate of Birth of the child issued under the Births and Deaths Registration Act 1957, and shall for all purposes be known as the Certificate of Birth of the child.

(6) Notwithstanding anything to the contrary in any written law, the Certificate of Birth under this Act, if given under the hand of the Registrar-General or any person authorized by him, shall be received without further or other proof as evidence of the facts and particulars relating to the birth of the child in respect of whom the Certificate of Birth was issued.

(7) If the Certificate of Birth issued under this Act is lost, damaged or defaced, the adoptive parent or either of the adoptive parents, or in the case of the adoptive parent or both adoptive parents being dead, the adopted child, may apply to the Registrar General or any person authorized by him for a copy of the Certificate of Birth which, when issued, shall be marked with the word 'Replacement'.

(8) The Registrar General shall establish and maintain a register to be called the Register of Birth Certificates in which shall be made such entries pertaining to the issuance of a Certificate of Birth under this Act in respect of an adopted child.

(9) Any person may apply in the prescribed form to have a search made of the Register of Birth Certificates upon payment of the prescribed fee and to have the result of the search certified in the prescribed form.

[33] From a reading of s 9 of the Adoption Act 1952, we agree that the section does confer certain rights to and impose certain duties on the adoptive parents. However, those rights that have been conferred on the adopted child are specifically spelt out. The conferred rights extend even to inheritance rights of the adopted child in the sense that the adopted child stands in the same position of his other adoptive siblings, as though the adopted child was a child born out of lawful wedlock of the adoptive parents. It would be erroneous to say that as the adopted child is deemed to be a child out of lawful wedlock, therefore his adoptive parents are thus his biological parents. And proceeding from there, since they were Malaysian citizens, it must necessarily follow that the adopted child must be a Malaysian citizen, by operation of law, to wit art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution. We said that it was erroneous and untenable, for two reasons. First, by deeming the child to be a child born out of lawful wedlock would

confer on him the status of a *legitimate* child. But that same deeming provision on being born out of lawful wedlock, does not, with respect, confer on the adoptive parents the status of being the *biological* parents of the adopted child. Secondly, s 9(1), with respect, confers rights stated thereunder, prospectively. The rights conferred on the adoptive parents operate only upon the granting of the adoption order. It does not operate retrospectively so as to obliterate what had been done in relation to the child before his adoption. The adoptive parents only come into the shoes of the biological parents upon the issuance of the adoption order, at which time, the rights of that the biological parent's rights, *in futuro*, over the child are, in law, extinguished. The presumed legitimacy must be understood in the context of what was intended in the scheme of things as contained in s 9(1) of the Adoption Act 1952 which is, among others, to render the adopted child to be on equal footing with his other adoptive siblings, if any. In light of that, the adoptive parents can never fulfil the critical ingredient in the Federal Constitution that requires the person to prove that his 'parents one at least is *at the time of the birth* either a citizen or permanently resident in the Federation', namely that of a biological parents. That is because it is a factual impossibility, as any adoption comes only after the birth, not at the time of the birth.

[34] We also note that these rights are 'deemed' rights conferred by the said Act of Parliament that is the Adoption Act 1952. That having been said that, these rights as conferred by s 9 of the Adoption Act 1952 are statutory rights. They are not rights conferred by the Federal Constitution as such. In fact, s 9 of the Adoption Act 1952 does not say anything pertaining to the citizenship status of the adopted child, upon adoption having duly been approved.

[35] As regards s 25A of the Adoption Act 1952, at first blush, sub-ss (5) and (6) therein, do seem to suggest and thus support the proposition advanced by the Respondent that the adopted child ought to be given automatic citizenship of the adoptive Malaysian parents, by operation of law. The language that was employed in those two subsections would appear to convey an interpretation of wide import. But again, it must be remembered that these provisions are contained in the Adoption Act 1952, which are specifically drafted to cater for the lawful adoption of children. It does not escape our notice as well, that in the referred to provisions of the Adoption Act 1952, no mention was made to the issue pertaining to the citizenship status of the adopted child. The effect to be given to those provisions contained in sub-ss (5) and (6) to s 25A must be confined to the ambit of its operability. To our minds, they are not intended to extend into the realm of the Federal Constitution in matters pertaining to citizenship.

[36] To our minds, with respect, the omission to refer to citizenship under s 9 of the Adoption Act 1952 was a deliberate one. The provisions on

citizenship reside under the Federal Constitution and they represent the accepted regime on citizenship and how it is and/or could be obtained. A reading of the art 14(1)(b) read with s 1(a) Part II, Second Schedule of Federal Constitution has yielded the following observations. We are of the view that the phrase 'is at the time of birth' refers to an actual factual event, referring therefore to the actual biological parent, as opposed to a 'deemed' biological parent created solely for the purpose of catering to the needs of the adopted child within the context of the Adoption Act 1952. We say so because, if the Federal Constitution had intended that an adopted child to a non-Malaysian citizen or a permanent resident of Malaysia, be conferred as a Malaysian citizen upon successful adoption, such provision would have been expressly stipulated in the Federal Constitution itself. The Adoption Act 1952, being a subsidiary legislation *qua* the Federal Constitution, cannot be interpreted in such a way as to augment what appears to be a perceived lacuna in the Federal Constitution. 'The ultimate touchstone of constitutionality is the Constitution itself and not any general principle outside it' per Raja Azlan Shah FJ (as His Highness then was) in *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

[37] Although sub-s (6) to s 25A of the Adoption Act 1952 is couched with the following phrase, 'Notwithstanding anything contained in any other written law ...' such assertion, with respect, does not exclude the omnipresent and omnipotent of the Federal Constitution. No written law can override nor supersede the Federal Constitution. Article 4(1) of the Federal Constitution expressly declares that any provision in any statute that in inconsistent with the Federal Constitution shall, to the extent of its inconsistency, be void and be of no effect.

[38] So the Adoption Act 1952, could not even pretend to confer citizenship to an adopted child upon successful issue of the adoption order from which the current birth certificate of the child was issued by the appellant.

[39] Put simply, the Adoption Act 1952 is not competent as a legal instrument to confer citizenship status to an adopted child under art 14(1)(b) read with s 1(a) Part II, Second Schedule of Federal Constitution. The fact that it is silent on that subject must be telling. Indeed, it would be futile to insert such a provision in the Adoption Act 1952. If it was the intention of the Federal Constitution to include an adoptive parent as a biological parent (parent whose at least one is at the time of the birth) for the purpose of art 14(1)(b) read with s 1(a) Part II, Second Schedule of Federal Constitution such intention would have found clear expression in the Federal Constitution *itself,* because to interpret an adoptive parent in the definition of a biological parent would have huge implications. To reiterate, we could not find such express stipulation in the Federal Constitution and neither could learned SFC nor Mr Raymond Mah, to that effect. In the circumstances, it would indeed be wrong for us to

read into the Federal Constitution something which is conspicuously not there. We are therefore in agreement with the learned SFC on this score.

[40] Two of the panel members of this court which had heard and dismissed the appeal by the appellant in the *CKN* case, namely my learned brother, Dato Zamani A Rahim and my learned sister, Puan Sri Zaleha Yusof, are of the view that nothing which they had heard in the oral, as well as in the written submissions by Mr Raymond Mah before us, had persuaded them to depart from their decision in the *CKN* appeal case. Having had the advantage of perusing the judgment of the learned JC in the *CKN* case which had been affirmed by this court on appeal, I, too have no reason to disagree with them. We can find no cogent reasons as to why we ought to depart from it. We are unanimous in our view that an adoption order issued under the Adoption Act 1952 does not confer Malaysian citizenship to an adopted child although one of his adoptive parents is a Malaysian citizen or a person permanently resident in Malaysia by operation of law, within the contemplation and ambit of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution. To be a Malaysian citizen by operation of law under the provisions of art 14(1)(b) read with s 1(a) Part II, Second Schedule of the Federal Constitution, the person must be born in Malaysia and one of his *biological* parents is at the time of his birth, either a Malaysian citizen or a person who is permanently resident in Malaysia. In this appeal before us, the applicants did not fulfil the crucial biological, or the *jus sanguinis*, criterion as envisaged under the said article.

[41] Lest we forget, it was also argued before us that the respondent had not exhausted his avenue for redress. In the case of *Robin Tan Pang Heng @ Muhammad Rizal bin Abdullah (suing as public officer at Penang Turf Club) v Ketua Pengarah Kesatuan Sekerja Malaysia & Anor* [2011] 2 MLJ 457; [2010] 9 CLJ 505 it was held by the apex court that an applicant seeking discretionary reliefs, including for certiorari and mandamus, must first exhaust all avenues open to him before running to the court for such reliefs. Learned Justice Heliliah Mohd Yusof FCJ held that:

> [22] ... the appellant requested the High Court to invoke its residual powers and as succinctly stated by Sir John Donaldson MR in *R v Epping and Harlow General Commissioners, ex parte Goldstraw* [1983] 3 All ER 257:
>
> > But it is a cardinal principle that, save in the most exceptional circumstances, that jurisdiction will not be exercised where other remedies were available and have not been used.
>
> [23] Even if the process invoked here had indeed been the process of judicial review in the true sense, this court will only be exercising a supervisory and not an appellate function. Lord Templeman in his speech in *In re Preston* [1985] 1 AC 835 observed:

Judicial review process should not be allowed to supplant the normal statutory appeal procedure.

[42] In this case, the respondent could still apply to be a citizen by applying an invocation of art 15A of the Federal Constitution, namely application for citizenship by way of registration for consideration by the Minister. We noted too that he had written to respondent on that avenue but that the request was turned away without it being considered by the honourable Minister. That would mean that his request had not been subject to the honourable Minister's consideration. In other words, he had not exhausted his available avenue for redress. That avenue is still available for him to explore.

OUR CONCLUSION

[43] In the upshot therefore, we allow this appeal. As a result, the whole decision of the learned High Court judge dated 1 March 2016 is set aside accordingly. We make no order as to costs.

Appeal allowed and the decision of the High Court set aside.

Reported by Ashok Kumar